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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ISSACH JEROME READY, Defendant and Appellant.	C078863 (Super. Ct. Nos. 94F08318, 13HC00436)
In re ISSACH JEROME READY, on Habeas Corpus.	C081325 (Super. Ct. Nos. 94F08318, 13HC00436)

In 1996 a jury convicted defendant Issach Jerome Ready of two murders when he was 16 years old and the trial court sentenced him to life without the possibility of parole (LWOP). In 2013 he filed a petition to recall his LWOP sentence and to resentence him.

(Pen. Code, § 1170(d)(2).)[1] Based on a host of factors, including his behavior during the 19 years he had spent in prison, the court denied his petition. Defendant filed a petition for a writ of habeas corpus challenging the constitutionality of the LWOP sentence and an appeal of the denial of his section 1170, subdivision (d)(2) petition. His habeas petition is moot. (*People v. Franklin* (2016) 63 Cal.4th 261, 276-280 (*Franklin*).) We reject defendant's contention that the trial court relied on improper factors in denying his section 1170, subdivision (d)(2) petition and affirm the judgment.

FACTS

On October 1, 1994, defendant, then 16 and a member of a Blood gang, accompanied other gang members to a party where members from rival gangs gave them hard looks. Angry, they left the party and returned armed with an AK-47. Defendant, with a bandana covering part of his face and socks on his hands, took the AK-47 out of the car, pointed the gun at Jason Hatch and shot and killed him, and then randomly fired toward a crowd of people in front of the house also killing Manuel Hernandez.

At his sentencing hearing in 1996, his lawyer urged the trial court to exercise its discretion under section 190.5 to sentence defendant to 25 years to life instead of LWOP for the murders. His lawyer pointed out he was only 16 years old at the time of the murders; his mother recently had died; he suffered from very discernable, clearly documented mental disorders; he was intoxicated at the time of the shooting; his codefendant, Jason Jack, was over the age of 18 and exercised considerable influence over defendant; and defendant fired the shots in such a random fashion demonstrating they were not deliberate and intentional.

The trial court rejected the invitation to exercise the discretion it was accorded by section 190.5. The court found: "I am convinced that the defendant is extremely

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[1] Undesignated statutory references are to the Penal Code.

dangerous. There is a danger -- There is no reasonable likelihood that his condition is credible, and I'm convinced that he suffers from mental disease or disorder of some kind. But beyond that, he is a psychopath and a sociopath, and he is extremely dangerous.

"As regards the relative culpability between him and [Jack], it seems to me that, if anything, [defendant] was the more culpable, the more willing to use violence. I don't think he needed anybody's encouragement to do what he did.

"His conduct was outrageous in the extreme. There was no provocation whatever. This was the worst kind of gratuitous violence. Totally uncalled for.

"So I decline to invoke Section 190.5 and order the defendant sentenced 25 years to life."

The 1996 LWOP is the subject of defendant's petition for a writ of habeas corpus.

The evolution of the law regarding the imposition of life sentences without the possibility of parole on children has been well documented. (See, e.g., *In re Kirchner* (2017) 2 Cal.5th 1040, 1045-1052; *Franklin, supra,* 63 Cal.4th at pp. 273-280; *In re Palmer* (2018) 27 Cal.App.5th 120, 132-135; *People v. Carter* (2018) 26 Cal.App.5th 985, 994-996; *People v. Gibson* (2016) 2 Cal.App.5th 315, 322-324.) Suffice it to say, there have been cataclysmic changes in the law governing sentencing children to life without the possibility of parole since defendant was sentenced in 1996. Pursuant to one of those changes, in 2013 defendant filed a petition to have his LWOP recalled and a new sentence imposed. (§ 1170, subd. (d)(2).) After hearings in October 2014 and January 2015, the court issued a 17-page ruling explaining at length the reasons for denying the petition. Because the court's exhaustive analysis is dispositive of this appeal, we quote from the final ruling at length.

The trial court considered defendant's conduct during the 19 years he had spent in prison before the section 1170 hearings. The court explained: "The court should not affix blinders concerning everything that has transpired regarding the defendant - both good and bad - in the past 19 years since the initial judgment and sentencing. It would

not make sense to determine whether a defendant, at age 16, appeared to be redeemable or irredeemable, when evidence is readily available of what actually occurred for the following 19 years that can illuminate whether the defendant has demonstrated redeemability during that passage of time. . . . [T]here is no evidence more directly relevant to the question of whether a particular 16-year-old defendant is redeemable in the future, than viewing the behavior that defendant actually engaged in during the next 19 years."

"The court finds the circumstances of the crimes to be so egregious as to have shown irreparable corruption. In addition, the crimes have impacted the families of the victims to a high degree. The court agrees with the original assessment of the crimes that was given by the Honorable Ronald Tochterman at the original judgment and sentencing.

"The court also specifically finds that since his incarceration, defendant has been extremely combative in prison. He has engaged in numerous fights with other inmates in 1998, 1999, 2000, and 2002; some involved mutual combat, where apparently the reporting officers did not see how the fights started, and in others defendant was clearly seen as being the initial aggressor, always with the fists.

"Defendant has also been verbally combative and continually refused to follow rules or orders. It appears defendant has spent long periods of time in the segregation unit. In 2006, he was again insubordinate, refusing to have a cellmate. In 2007, he stated he would kill any cellmate he was given, and that he would kick the [person's] ass 'or' stab the [person]. He refused to comply with officers trying to cuff him at that time, and pepper spray had to be employed. Two months later, he again refused to have a cellmate, and he refused to come to the disciplinary hearing, which he had done on other occasions as well. There was another such occurrence several months later in 2007. In 2009, he refused to move into another cell, and again refused to be present at [the] disciplinary hearing. In 2010, he and other inmates refused to comply with an unclothed body search. In another 2010 incident, he refused to go to a new housing assignment. In 2011, he had

an altered privacy curtain. There had been other minor incidents in prior years. In 2012, he was disciplined for participation in a riot, where he had been a willing participant with about 60 other inmates in fighting each other with their fists; defendant had been seen running across the yard, then swinging closed fists to the upper body and torso of an inmate. All of this represents an extremely clear picture that defendant has engaged in a constant pattern of violence and insubordination since the outset of his incarceration, and that he is utterly irredeemable. This evidence is extremely compelling.

"Defendant's role in the crimes was not dominated by anyone else. Rather, he was the one who chose to get the gun, and he was the one who chose to shoot it. Nothing about the crimes indicates that his conduct is excusable in any form or manner due to his age of 16 at the time.

"The court has reviewed the expert opinions rendered at the time of trial, on defendant's mental condition. As with both the jury and the Honorable Ronald Tochterman, the court does not find these reports completely believable or compelling. Indeed, nothing in the prison records submitted to the court give any indication that defendant is actually mentally retarded or borderline mentally retarded. To the contrary, he appears to have been able to understand and give answers that did not evidence any mental deficiencies, and even passed his GED exam as early as 2008. This makes it questionable whether his IQ ever really was as low as the experts had reported at the time of trial. Defendant could have been feigning mental deficiencies. And defendant did appear to have a substance abuse problem at the time of the crimes, which might account for his reporting hallucinations rather than that being attributable to an actual mental illness. Without an updated psychological report discussing defendant's actual mental capabilities and possible illnesses throughout his lifetime, the court is reluctant to find any differently than did the jury and the Honorable Ronald Tochterman at the time of trial, in this regard.

"The court has examined the evidence of defendant's home life, the death of his mother, and other aspects of his background. None of this is compelling enough to overcome his irredeemable violent behavior.

"The court has also specifically considered that defendant was only 16 years of age at the time of the commission of the crimes, and all of the evidence of the hallmarks of youth. The court, however, does not deem any of this compelling in this particular case, in light of defendant's 19 years of violent and other misbehavior in prison since the judgment and sentencing. Nor does defendant appear to have exhibited any capacity for redeemability at the time of the original judgment and sentencing."

We must address defendant's petition for a writ of habeas corpus challenging the constitutionality of his original sentence in 1996 and his appeal of the denial of his petition to recall his sentence pursuant to section 1170.

DISCUSSION

I

Habeas Corpus

Defendant challenges the constitutionality of his 1996 LWOP sentence. The California Supreme Court has resolved that issue for us. In *Franklin*, *supra*, 63 Cal.4th 261, the court held that recent legislation, that is, sections 3051 and 4801 of the Penal Code, which entitles juvenile offenders to a parole hearing in their 25th year in prison had effectively "superseded" the 50-year-to-life sentence the defendant had received and rendered "moot" any constitutional challenge under the rationale of *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*). The court explained: "Penal Code sections 3051 and 4801—recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham* [*v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825]], and [*People v.*]*Caballero* [(2012) 55 Cal.4th 262]—moot Franklin's constitutional claim. Consistent with constitutional dictates, those statutes provided Franklin with the possibility of

release after 25 years of imprisonment (Pen. Code, § 3051, subd. (b)(3)) and require the Board of Parole Hearings . . . to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (*id.*, § 4801, subd. (c)). In light of this holding, we need not decide whether a life sentence with parole eligibility after 50 years of incarceration is the functional equivalent of an LWOP sentence and, if so, whether it is unconstitutional in Franklin's case." (*Franklin, supra,* at p. 268.)

The parties did not address *Franklin* in their briefing. In his supplemental letter brief submitted at our request, defendant argues his petition is not moot, in spite of *Franklin,* and he urges us to consider his constitutional challenge on the merits. His arguments are not persuasive most notably because they are premised on abstract potential flaws that may arise in hypothetical parole board hearings divorced from the actual meaningful review he was afforded, one which provided him a realistic chance of release. The Attorney General, by contrast, finds *Franklin* dispositive and the petition moot.

Defendant rejects the notion that hearings compelled by the new legislation provide a meaningful opportunity for release. He complains that the Board of Parole Hearings has yet to revise the applicable regulations to incorporate the *Miller* factors and has, on at least one occasion, failed to give those factors the requisite "great weight" to which they are entitled. (*In re Palmer, supra,* 27 Cal.App.5th at p. 124.) He argues that according to *In re Kirchner, supra*, 2 Cal.5th at pages 1043, 1053, and *People v. Contreras* (2018) 4 Cal.5th 349, 356, we must examine how the Board of Parole Hearing's regulations treat the *Miller* factors and how the process actually works. In short, defendant would have us engage in a wholesale examination of how the new legislation is implemented in practice to determine whether the hearings he was provided in 2014 and 2015 render his constitutional challenge moot. In the same vein, he contends his petition is not moot because the flaws in the hearings provided all those who

committed their offenses before their 18th birthdays, are recurring. Thus, again he attempts to dodge dismissal for mootness by analogizing his hearings to those of his hypothetical peers. We take a much more circumscribed view of the mootness question before us as dictated by our Supreme Court and modeled by our sister courts.

As the Attorney General aptly points out there are no longer any effective LWOP sentences in the state of California. The underpinning for the constitutional analysis in *Miller* and its progeny was the United State Supreme Court's determination that, in the absence of a thorough consideration of all the factors mitigating a child's culpability, the imposition of a life term or, according to the California Supreme Court, a life term's functional equivalent (*People v. Caballero, supra*, 55 Cal.4th at p. 268 (*Caballero*)), constituted cruel and unusual punishment under the Eighth Amendment because the gravity of the punishment was not necessarily commensurate with the child's culpability. (*Miller, supra*, 567 U.S. at p. 469.) But if, as section 3051 now compels, a juvenile's sentence must be reconsidered at regular time intervals and recalibrated to take account of all of the youth-related factors that mitigate culpability and forecast potential growth and rehabilitation, the disconnect between egregiously long sentences and immature culpability vanishes. There remains, therefore, no Eighth Amendment impediment to lengthy sentences when they remain subject to review and the youthful offenders have the opportunity for meaningful review and release from prison.

People v. Scott (2016) 3 Cal.App.5th 1265 is in accord. The court concluded: "[T]he definite parole eligibility schedule, devised by the Legislature, as requested by the *Caballero* court, and described in section 3051, is both constitutionally permissible and an orderly mechanism to provide juveniles convicted as adults of serious nonhomicide crimes with a meaningful opportunity for release within their lifetimes." (*Scott, supra*, at p. 1281.) The court offered three justifications for its conclusion. First, section 3051 abolished de facto life sentences by "virtue of its provision for mandatory parole eligibility hearings after no more than 25 years in prison." (*Scott, supra*, at p. 1281.)

Second, section 3051 establishes a parole eligibility mechanism, as the California Supreme Court requested in *Caballero*, that allows prisoners who were given life terms while juveniles to obtain parole if they demonstrate rehabilitation and maturity after 25 years. (*Scott. supra*, at p. 1282.) Third, section 3051 "allows the current sentencing scheme to continue without upheaval" by making it constitutional. (*Scott, supra*, at p. 1282.)

People v. Jones (2017) 7 Cal.App.5th 787 addresses the question of mootness directly.

"Here, Jones's claim that his sentence of 80 years to life violates the Eighth Amendment because it is the functional equivalent of LWOP has been rendered moot. In response to *Graham*, *Miller*, and *Caballero*, the Legislature enacted section 3051, effective January 1, 2014. Section 3051 states that 'any prisoner who was under 23 years of age at the time of his or her controlling offense' shall be provided '[a] youth offender parole hearing . . . for the purpose of reviewing the [prisoner's] parole suitability . . . .' (§ 3051, subd. (a)(1).) 'A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . .' (§ 3051, subd. (b)(3).) Section 4801 provides that the parole board 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' (§ 4801, subd. (c).)

"In *Franklin, supra*, 63 Cal.4th 261, the California Supreme Court held that 'sections 3051 and 4801[,] . . . enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero*,' mooted a juvenile's claim that his sentence of 50 years to life was the functional equivalent of LWOP and thus unconstitutional. (*Id.* at p. 268.) The Supreme Court explained that, '[c]onsistent with

constitutional dictates, those statutes provide [the juvenile] with the possibility of release after 25 years of imprisonment [citation] and require the [parole board] to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." ' (*Ibid.*) Because the enactment of the statutes meant that the juvenile was 'now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration,' his sentence 'is neither LWOP nor its functional equivalent' and 'no *Miller* claim arises.' (*Id.* at pp. 279-280.)

"Like the juvenile offender in *Franklin*, Jones will be entitled to a youth offender parole hearing with a meaningful opportunity for release after 25 years of incarceration. (§ 3051, subd. (b)(3).) Therefore, pursuant to section 3051 and the holding in *Franklin*, Jones's sentence of 80 years to life in state prison is not the functional equivalent of LWOP, and his constitutional challenge to the sentence is moot." (*People v. Jones*, *supra*, 7 Cal.App.5th at pp. 817-818.)

Moreover, a unanimous California Supreme Court is taking the same approach. It dismissed a very similar case as moot. (*People v. Padilla* (2017) 4 Cal.App.5th 656, review granted Jan. 25, 2017, S239454, dism. as moot June 13, 2018.) The Court of Appeal had rejected a mootness claim because the petitioner, who was 16 when he committed murder, was denied conduct credits based on the LWOP he was serving. He too had petitioned the court to recall his LWOP and resentence him pursuant to section 1170, subdivision (d)(2). In its cursory disposition, the Supreme Court wrote: "Dismissed and remanded to the Court of Appeal, Second Appellate District, Division Four. The above-captioned matter is dismissed as moot in light of Senate Bill No. 394, signed into law on October 11, 2017. The matter is remanded to the Court of Appeal, Second Appellate District, Division Four with directions to remand to the trial court for further proceedings. (Cal. Rules of Court, rule 8.528(b).)" (*People v. Padilla* (June 13, 2018, S239454) 2018 Cal. Lexis 4130.) Similarly, the court dismissed *People v. Lozano*

(2018) 16 Cal.App.5th 1286 (review granted Feb. 21, 2018, S246013, dism. as moot Aug. 29, 2018) as moot based on the passage of Senate Bill 394 assuring that all prisoners who had been sentenced to life without the possibility of parole for homicides committed before they turned 18 years old were entitled to parole eligibility hearings and the opportunity to seek and obtain release from prison.

In summary, while *Graham* set the stage for reconsideration of the culpability of children within the context of the Eighth Amendment, *Miller* upended our understanding of proportionality when lethal conduct is committed by immature youngsters whose brains are not fully developed. Simply put, *Miller* makes clear the Eighth Amendment will not tolerate confinement of persons who committed their crimes as children for life without any possibility of parole absent a careful consideration of all the hallmark characteristics of youth. The California Legislature first attempted to satisfy *Miller*'s new calibration by providing inmates who had committed their capital offenses before the age of 18 an opportunity to petition the court for a hearing and resentencing. (§ 1170, subd. (d)(2).) When that effort fell short of satisfying *Miller*, the Legislature enacted sweeping legislation to provide all offenders who committed homicide before the age of 18 with a parole eligibility hearing after serving 25 years. (§ 3051.) The United States Supreme Court endorsed a legislature's ability to remedy *Miller* error (*Montgomery v. Louisiana* (2016) 577 U.S. ___, ___ [193 L.Ed.2d 599, 618]) and the California Supreme Court has now held that California's remedy means, as a practical matter, that there are no true LWOP's in this state. (*Franklin, supra*, 63 Cal.4th at p. 277.) We, therefore, conclude that the courts, in tandem with the Legislature, have ended the unconstitutional practice of committing children to prison for life without the possibility of parole and without any meaningful opportunity for release in their lifetime. Following the legislative fix to *Miller* deficiencies, the Supreme Court dismisses cases, such as ours, as moot. (*Franklin, supra*, at p. 268*; People v. Padilla, supra*, 4 Cal.App.5th 656*; People v. Lozano, supra*, 16 Cal.App.5th 1286.) Constitutional challenges to LWOP sentences

imposed on children no longer remain viable because the Legislature effectively has disposed of LWOP's altogether. Subservient, as we are, to Supreme Court interpretations of legislative enactments, we dismiss the habeas petition as moot.

II

Appeal of the Denial of Defendant's Section 1170, subdivision (d)(2) Petition

Defendant contends the trial court improperly denied his section 1170, subdivision (d)(2) petition by relying on his prison conduct, discounting his mental condition, finding he was not dominated by an older gang member, and ignoring his chaotic family situation, including the death of his mother. These alleged missteps violate the Supreme Court's directives in *Miller, supra*, 567 U.S. 460.

In *Miller*, the Supreme Court held that it is cruel and unusual punishment to mandate LWOP sentences for children who commit a homicide. The court explained: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment . . . [G]iven all we have said [in a litany of cases] about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, *supra*, 567 U.S. at pp. 479-480.) The court identified various factors that are generally relevant to the individualized determination whether to impose an LWOP when the perpetrator was a child at the time of the crime.

The California Supreme Court in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360-1361 (*Gutierrez*) further clarified the type of relevant evidence *Miller* requires to be considered before imposing an LWOP including: (1) the defendant's age and the " 'hallmark features' " of youth, i.e., immaturity, impetuosity, and failure to appreciate risks and consequences; (2) relevant " 'environmental vulnerabilities' " such as childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance; (3) the circumstances of the present offense, the way familial and peer pressures may have affected the defendant, and whether substance abuse played a role in the defendant's commission of the offense; (4) whether the defendant " 'might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys' "; and (5) any evidence or other information bearing on the possibility of rehabilitation, including the extent or absence of a prior criminal record. (*Gutierrez, supra,* at pp. 1388-1389.)

The rigor *Miller* imposes on sentencing is not a mere procedural checklist, but a substantive rule. In *Montgomery v. Louisiana, supra,* 577 U.S. ___ [193 L.Ed.2d 599], the United States Supreme Court again considered the Eighth Amendment's applicability to juvenile sentencing. The court explained that "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.' [Citation.] Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects ' "unfortunate yet transient immaturity" ' [Citation.] . . . As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it ' "necessarily carr[ies] a significant risk that a defendant" '—here, the vast majority of juvenile offenders—

‘ “faces a punishment that the law cannot impose on him.” ’ [Citation.]” (*Montgomery, supra,* at p. ___ [193 L.Ed.2d at pp. 619-620].)

The record discloses that the trial court carefully considered the *Miller/Gutierrez* factors. We review the trial court’s sentence for an abuse of discretion. (*People v. Gibson, supra,* 2 Cal.App.5th at p. 325.) Yet defendant insists that in some areas the trial court considered too much and in others it considered too little. We review each of those claims aware that “a trial court’s exercise of discretion will not be disturbed unless the trial court exercised it in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*Ibid.*)

Prison Misconduct

Defendant argues that the court improperly considered his prison conduct. In his view, the remedy for the initial imposition of the unconstitutional sentence in 1996 was for the trial court in 2015 to pretend it was imposing a sentence when he was 16 years old, not 19 years later. *Gutierrez* does not compel us to discard our common sense; nor does *Miller* compel such a cramped view of the evidence a trial court may consider years after the crime was committed.

The Attorney General argued in *Gutierrez* that section 1170, subdivision (d)(2) “eliminate[d] any constitutional problems” arising from an otherwise unconstitutional LWOP sentence because the possibility of recall and resentencing converted the juvenile’s sentence to a term other than LWOP. (*Gutierrez, supra,* 58 Cal.4th at p. 1384.) In that context, the Supreme Court rejected the Attorney General’s notion that section 1170, subdivision (d)(2) cured the constitutional violation that had occurred at the outset when he had been presumed to be incorrigible. The issue whether a juvenile’s subsequent conduct in prison should be considered in later hearings assessing whether he remained incorrigible was not before the court in *Gutierrez* and that decision does not dictate whether or not a trial court can properly consider his prison conduct.

We turn therefore to the provisions of the statute. Section 1170, subdivisions (d)(2)(F) and (G) contain factors to assist the trial court in determining whether to grant a petition. Subdivision (d)(2)(F) provides: "The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor." (§ 1170, subd. (d)(2)(F)(viii).) In addition, a court may rely on "any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria." (§ 1170, subd. (d)(2)(I).) Defendant, proud that he has no disciplinary actions within the last five years, argues that this specific provision prevails over the more general one allowing a court to use any other relevant criteria. But the rule of statutory construction defendant cites applies only when there is a conflict between competing provisions.

Here there is no conflict. Section 1170, subdivision (d)(2)(I) gives the trial court wide discretion to consider any relevant criteria and subdivision (d)(2)(F)(viii) identifies a particular factor that will demonstrate an inmate's progress in curtailing violent behavior. The latter is identified as an especially important factor in deciding a resentencing petition. But this factor does not conflict with the general prerogative given the trial court to consider any other relevant evidence. The two are easily harmonized. Thus, defendant's prison conduct could be properly considered pursuant to subdivision (d)(2)(I).

Defendant next sets up a false analogy. He claims that using his postsentencing conduct violates the proscription against increasing a sentence following an appeal. Using in-prison misconduct to consider a petition to possibly reduce a sentence is very different from increasing a defendant's sentence after he or she has filed an appeal. We agree with the Attorney General there is a strong policy not to punish a criminal defendant for pursuing his or her right to appeal. But there is nothing punitive about

allowing a court to consider exceedingly relevant behavior in determining whether a defendant is incorrigible.

The trial court provided an in-depth analysis of defendant's prison misconduct observing that he had been "extremely combative in prison" and "engaged in numerous fights with other inmates." He was "verbally combative and continually refused to follow rules or orders." The court found the prison misconduct evidence "extremely compelling." The court enumerated his many offenses as follows:

"[Defendant] engaged in numerous fights with other inmates in 1998, 1999, 2000, and 2002; some involved mutual combat, where apparently the reporting officers did not see how the fights started, and in others defendant was clearly seen as being the initial aggressor, always with the fists.

"Defendant has also been verbally combative and continually refused to follow rules or orders. It appears defendant has spent long periods of time in the segregation unit. In 2006, he was again insubordinate, refusing to have a cellmate. In 2007, he stated he would kill any cellmate he was given, and that he would kick the [person's] ass 'or' stab the [person]. He refused to comply with officers trying to cuff him at that time, and pepper spray had to be employed. Two months later, he again refused to have a cellmate, and he refused to come to the disciplinary hearing, which he had done on other occasions as well. There was another such occurrence several months later in 2007. In 2009, he refused to move into another cell, and again refused to be present at disciplinary hearing. In 2010, he and other inmates refused to comply with an unclothed body search. In another 2010 incident, he refused to go to a new housing assignment. In 2011, he had an altered privacy curtain. There had been other minor incidents in prior years. In 2012, he was disciplined for participation in a riot, where he had been a willing participant with about 60 other inmates in fighting each other with their fists; defendant had been seen running across the yard, then swinging closed fists to the upper body and torso of an inmate. All of this represents an extremely clear picture that defendant has engaged in a

constant pattern of violence and insubordination since the outset of his incarceration, and that he is utterly irredeemable. This evidence is extremely compelling."

Defendant contends that this behavior "becomes more understandable in light of the realities of California's prison system" and his mental illness. He produced no evidence about the realities of the prison system, his mental illness since he has been incarcerated, or how the system has failed to meet his needs. In the absence of any evidence, we cannot say the trial court abused its discretion by considering his prison misconduct; nor can we find the court improperly evaluated its significance.

Defendant maintains the trial court's incomplete evaluation of his brain disorder constitutes an abuse of discretion. The trial court, having reviewed all of the evidence before it, concluded that defendant's mental health evidence was not "completely believable or compelling" and nothing in his prison records indicated he was "mentally retarded or borderline mentally retarded." The prosecution's experts' testimony that defendant was of average intelligence supported the trial court's conclusions. Although nearly 20 years had passed since defendant had been evaluated, he did not submit any updated psychological evidence in support of his petition. The court concluded that "[w]ithout an updated psychological report discussing defendant's actual mental capabilities and possible illnesses throughout his lifetime, the court does not find any differently than did the jury and the Honorable Ronald Tochterman at the time of trial, in this regard. Although defendant has now submitted to the court his prison medical records, defendant still has not presented any expert witness to testify to defendant's mental capabilities and illnesses throughout his lifetime, including the present time, thus the court does not find anything mitigating in this regard."

Defendant accuses the court of ignoring the breadth of the evidence of his mental deficiencies. He cites to the testimony of the two experts who testified on his behalf in 1996. Dr. Albert Globus had testified he was not competent to stand trial and was close to developmentally disabled with an IQ of 80. Dr. Helaine Rubenstein reported that

defendant's memory was impaired and he "doesn't really understand what is going on." She too believed he was developmentally disabled and "borderline mentally defective." During the sanity phase, Dr. Globus testified defendant was "depressed or dysphoric" and had a "very poor self-image," and "felt considerable anxiety." He also testified, defendant heard voices and was afraid people were trying to hurt him. Similarly, Dr. Rubenstein confirmed that defendant suffered from organic brain damage and psychopathology and was experiencing secondary psychotic symptoms. Overall, he had a "very modest global intelligence, in a mildly retarded brain-damaged adolescents [*sic*] male with a history of mental illness, dated to age nine." All of his symptoms were exacerbated by his use of marijuana and alcohol.

Thus, the trial court was well aware of the breadth of the mental health challenges defendant's experts had believed he had suffered 19 years earlier. Defendant's argument on appeal is nothing more than a disagreement with the conclusions the trial court reached after an exhaustive survey of his mental health history. The court had the opportunity to observe defendant at his hearing on the petition and to read the letter he had written as well as all the evidence which had been presented at the original sentencing hearing in 1996. Not only did the court question the credibility of the evidence presented, but it had no new evidence to evaluate the defendant's current mental health. There is nothing to suggest the trial court overlooked any of the extensive evidence the defendant had presented in 1996. We therefore disagree with defendant that the court did not fully appreciate the significance of the evidence before it; rather the court simply disagreed with the conclusion defendants' experts had reached nearly 20 years ago. On this record, we can find no abuse of discretion exceeding the bounds of reason by rejecting defendant's argument that his brain disorder necessitated a recall of his sentence.

Family Life

Defendant's mother died a year before the shooting. His mother's death, he insists, precipitated his participation in a gang and his ensuing lawlessness. The court stated that it "has examined the evidence of defendant's home life, the death of his mother, and other aspects of his background. None of this is sufficiently compelling to overcome his irredeemable violent behavior." There is no question that defendant suffered a devastating loss at a volatile time in his adolescence. And the court acknowledged the sad fact that defendant's mother had died. But as long as the trial court properly considered the factors that might have mitigated the callousness of his behavior at the time and suggested that there was hope for his rehabilitation as he worked through his grief, we cannot say the trial court abused its discretion just because it reached the conclusion that defendant unfortunately is one of those rare juvenile's whose behavior was and remains incorrigible.

Domination by Another Gang Member

Defendant attempts to mitigate his own culpability by shifting primary responsibility to his fellow gang member, codefendant Jack, who he contends dominated him. He reminds us that it was Jack who was offended by the "hard looks" they were given at the party and it was Jack who not only proposed a violent response, but took the gun from the trunk of the car and handed it to defendant. But the whole record tells a very different story.

Defendant was far from being a young boy under the direction of a more powerful adult. It was defendant who said he could get an AK-47 from a friend and it was defendant who instructed Jack where to go to get the gun. Once in the car, he took off his shoes to use his socks as gloves. He was agitated when they got out of the car, pacing back and forth saying, "Fuck that, man, fuck that." Witnesses described defendant, not Jack, as the person who removed the gun from the truck, put a bandana on his face, and

resisted the attempts of others to calm him down. He was the one who fired two shots in the air and then around a dozen shots into the crowd.

Based on this evidence, the trial court concluded that defendant's "role in the crimes was not dominated by anyone else. Rather, he was the one who chose to get the gun, and he was the one who chose to shoot it. Nothing about the crimes indicates that his conduct is excusable in any form or manner due to his age of 16 at the time." The evidence supports the court's finding and there is nothing arbitrary or capricious about denying the petition.

DISPOSITION

The petition for habeas corpus is dismissed. The judgment is affirmed without prejudice to defendant filing a motion in the trial court for a proceeding under *Franklin, supra,* 63 Cal.4th 261, to place on the record information that may be relevant at his future parole hearing as authorized by section 1203.01 and recently explained in *In re Cook* (2019) 7 Cal.5th 439, 458-459.

RAYE, P. J.

We concur:

MAURO, J.

RENNER, J.